BEFORE THE

STATE OF CALIFORNIA

OCCUPATIONAL SAFETY AND HEALTH

APPEALS BOARD

In the Matter of the Appeal of: E. L. YEAGER CONSTRUCTION COMPANY, INC. P. O. Box 87 Riverside, CA 92502 Employer	Docket No. 01-R5D3-3261 **DECISION AFTER RECONSIDERATION**

The Occupational Safety and Health Appeals Board (Board), acting pursuant to authority vested in it by the California Labor Code and having granted the petition for reconsideration filed in the above entitled matter by E. L. Yeager Construction Company, Inc. (Employer), and taken this matter under reconsideration on its own motion, makes the following decision after reconsideration.

JURISDICTION

Between March 16 and July 6, 2001, a representative of the Division of Occupational Safety and Health (the Division) conducted an investigation of a fatal accident at a place of employment maintained by Employer at 2700 East Main Street, Barstow, California (the site).

On July 12, 2001, the Division issued to Employer Citation 1, alleging a serious violation of section 3328[e] of the occupational safety and health standards and orders found in Title 8, California Code of Regulations.[1] The Division proposed a civil penalty of $18,000 for the violation.

Employer filed a timely appeal contesting the existence of the alleged violation and the reasonableness of the proposed penalty. On February 8, 2005, a hearing was held before an Administrative Law Judge (ALJ) of the Board and the violation was sustained. On April 21, 2005, the Board took this matter under reconsideration on its own motion. Employer subsequently filed a petition for reconsideration on April 25, 2005, which was granted by the

[1] Unless otherwise specified all references are to sections of Title 8, California Code of Regulations.

Board. The Division filed answers to both the Board's order of reconsideration and Employer's petition.

EVIDENCE

Employer operates an asphalt plant at the site. The plant takes liquid asphalt and other materials, such as sand, and combines them to make asphalt paving material. The finished material is stored in a silo which feeds into a weigh hopper from which it is dumped into trucks. The weigh hopper is capable of holding several tons of the material; it was estimated to have been holding about 26,000 pounds at the time of the accident at issue, well within the hopper's rated capacity.[2]

It was standard practice at Employer's facility to empty the silo and weigh hopper at the end of the day to the ground beneath the structure, and use a small front-end loader, also called a "skip loader," to scoop up that material for return to storage for reprocessing. During such a procedure on March 16, 2001, the weigh hopper broke loose from its support structure and fell on the skip-loader being operated by one of Employer's employees, resulting in his death. Employer had purchased the weigh hopper system in used condition from another company, and installed it without modification. The weigh hopper had been manufactured by a reputable producer of such equipment. There was no evidence that the weigh hopper was defective or that Employer knew or should have known of a problem with it. The Division was unable to determine the cause of the accident, although the Division's witness gave opinion testimony regarding the cause.

Employer was cited for failure "to secure the weigh hopper to minimize the hazard of falling as a result of the failure weigh hopper scale/support system." (*sic*) The Division offered evidence that the weigh hopper should have been equipped with a secondary restraint system to prevent an accident such as the one here in the event the weigh hopper were to break loose from the overall structure.

ISSUES

The Board's order of reconsideration listed the issues to be considered as:

1. Does section 3328(e) apply to the condition cited?
2. Does section 3328(e) require secondary restraint systems?
3. Was the classification of the violation appropriate?

Employer's petition for reconsideration stated additional issues, which the Board agreed to consider. Employer's petition argued that Employer had no reason to suspect the equipment was defective, since it was manufactured by a reputable company. Employer also argued that the Division did not prove

[2] There was testimony that the weigh hopper was capable of holding 50,000 pounds or more.

what caused the accident, since the only evidence about the cause was the opinion of the investigator that the breakage of a component part was possibly due to metal fatigue. Employer further argued that section 3328(e) does not require secondary restraints, that the Division's evidence that other similar installations are so equipped is anecdotal at best, and that since the Division did not present evidence regarding the normal operation of the weigh hopper there is no evidence that a secondary restraint was not already built in. Lastly, Employer argued the serious classification was incorrect, pointing out that the Division's witness testified that Employer could not have known of the collapse in advance.

FINDINGS AND REASONS FOR DECISION AFTER RECONSIDERATION

As stated above, Employer was cited under Title 8, California Code of Regulations, section 3328(e) for failure "to secure the weigh hopper to minimize the hazard of falling as a result of the failure weigh hopper scale/support system." Section 3328 in its entirety states:

> a. Machinery and equipment shall be of adequate design and shall not be used or operated under conditions of speeds, stresses, or loads which endanger employees.
> b. Machinery and equipment in service shall be inspected and maintained as recommended by the manufacturer where such recommendations are available.
> c. Machinery and equipment with defective parts which create a hazard shall not be used.
> d. Machinery and equipment designed for a fixed location shall be restrained so as to prevent walking or moving from its location.
> e. *Machinery and equipment components shall be designed, secured, or covered to minimize hazards caused by breakage, release of mechanical energy (e.g., broken springs), or loosening and falling.*
> f. Any modifications shall be in accordance with (a) and with good engineering practice.
> g. Machinery and equipment in service shall be maintained in a safe operating condition.
> h. Only qualified persons shall be permitted to maintain or repair machinery and equipment.
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> (Emphasis added.)

This is a case of first impression for the Board. We have not interpreted or applied the language of section 3328(e) to a situation such as this.[3] Only if

[3] *Carris Reels of California,* Cal/OSHA App. 95-1456, Decision After Reconsideration (Dec. 6, 2000), held that section 3328(e) did not apply to a component of a reel that had not yet been assembled, holding the

we determine that there was a violation of the safety order do we need address the issue of the violation's classification.

To determine whether Employer violated section 3328(e) we begin by carefully considering the text of section 3328(e). As quoted above, it requires that "Machinery and equipment components shall be designed, secured, or covered to minimize hazards caused by breakage, release of mechanical energy (e.g., broken springs), or loosening and falling." Next we consider which portions of the foregoing text are applicable given the facts of this case.

The operative portions of section 3328(e) in this case are: Machinery and equipment components shall be designed or secured to minimize hazards caused by breakage or loosening and falling. The critical terms in the above distillation of section 3328(e) are (1) machinery and equipment components; (2) designed or secured; (3) minimize; and (4) breakage or loosening and falling.

By its terms section 3328(e) applies to "machinery and equipment" in use at places of employment in California. It is not disputed that the weigh hopper is an item of machinery or equipment subject to section 3328(e). Accordingly, section 3328(e) applies. Similarly, it was not disputed that there was "breakage" or "loosening and falling" of the weigh hopper though it was not shown how, why or in what sequence that event or series of events occurred.

The next term to consider is "designed or secured." We note that the words are used in the disjunctive, and we therefore interpret the standard to mean that the machinery or equipment in question must be designed to minimize hazards or secured to minimize hazards, in this instance due to breakage or loosening and falling. The standard does not require machinery or equipment to both be designed *and* secured to minimize the listed hazards.

We first address the term "secured." Upon detailed review and consideration of the record, we find that whether section 3328(e) mandates a secondary restraint system is the dispositive issue. Section 3328(e) does not mention, let alone require, secondary restraints. Thus the Division's evidence that had the weigh hopper been equipped with a secondary restraint system it would not have fallen is not probative, even if correct.[4]

Since the Occupational Safety and Health Standards Board (Standards Board) did not include such a requirement we may not read one into the safety order. The Appeals Board has held that its function is "to interpret[ ] and apply[ ] the safety orders adopted by the Standards Board. [The Appeals Board] may not go beyond that function and ignore or revise the requirements

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component was not a piece of equipment. We said in *Carris Reels,* "section 3328(e) does not, and was not intended by the Standards Board, to extend to the facts of this case. …[¶] Moreover, the inapplicability of subsection (e) [of section 3328] to the facts of this case is clear based on the express terms of the subsection." *Carris Reels, supra,* therefore, addressed a different question under section 3328(e).

[4] The evidence consisted of the opinion of the Division's witness, Senior Safety Engineer Tony Serpas.

of [those] order[s].*"* *Superior Construction Inc.*, Cal/OSHA App. 96-2267, Decision After Reconsideration (Dec. 21, 2000); *HFS Investments, Inc.*, Cal/OSHA App. 96-3079, Decision After Reconsideration (June 6, 2001);; see, also, *Herman Weissker, Inc.,* Cal/OSHA App. 00-1462, Decision After Reconsideration (May 10, 2002) ["Nor are we inclined to rewrite the coverage provisions of the safety orders, which is within the sole authority of the Standards Board."].[5] In *Mobil Oil Corp.*, Cal/OSHA App. 00-222, Decision After Reconsideration (Apr. 29, 2002), the Board stated: "The Board cannot impose stricter or more detailed requirements than those set in a safety order promulgated by the Standards Board." Accord: *Hylton Drilling Co.*, Cal/OSHA App. 82-216, Decision After Reconsideration (Jan. 17, 1986); and *Lockheed Missiles and Space Co., Inc.*, Cal/OSHA App. 74-629, Decision After Reconsideration (Apr. 10, 1975) [In interpreting a statute [or regulation], the judge may simply ascertain and declare what is expressed, not insert what may have been omitted. The Division's interpretation is not binding upon the Appeals Board.]

Accordingly, the ALJ erred in holding that section 3328(e) requires secondary restraints, and Employer's appeal must be granted.

There is a second, independent line of authority leading to the same result. Where, as here, a safety order established alternative means of compliance, the Board has held the Division must show which option the employer selected and that it did not comply with it or any of the alternatives in the safety order.

In the instant proceeding, the Division contended that the weigh hopper was not properly "secured." Even leaving aside the question of whether a secondary restraint requirement can be read into the terms of the safety order, there was no evidence that the weigh hopper was not "designed . . . to minimize hazards caused by breakage, release of mechanical energy (e.g., broken springs), or loosening and falling."

In *Delta Excavating, Inc.*, Cal/OSHA App. 94-2389, Decision After Reconsideration (Aug. 10, 1999), the Board held that the cited safety order gave employers four options by which to comply with the mandate to protect excavations against cave-ins. The safety order language was written in the disjunctive, as here. The Board held that the Division had the burden to prove which option the cited employer chose and that it did not comply with <u>any</u> of the four listed options. Therefore, it was insufficient to merely show that the employer did not comply with just one of those options.

Here, because the design of the weigh hopper was not properly addressed, and "secured" and "designed" are written in the disjunctive, under

[5] Moreover, reading an unstated requirement into a safety order would be a form of underground regulation. Needless to say, neither the Division nor the Board may engage in such activity under the Administrative Procedures Act, Govt. Code section 11340 et. seq.

Delta Excavating, supra, the Division failed to meet its burden of proof, and Employer's appeal must be granted.

DECISION AFTER RECONSIDERATION

The ALJ's decision is reversed and Employer's appeal is granted.

CANDICE A. TRAEGER, Chairwoman
ROBERT PACHECO, Board Member

OCCUPATIONAL SAFETY AND HEALTH APPEALS BOARD
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